BEFORE THE POLLUTION CONTROL and SHORELINES HEARINGS BOARDS
STATE OF WASHINGTON

NOOKSACK INDIAN TRIBE, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; WHATCOM COUNTY; and WARM CREEK HYDRO, INC.; Respondents.	)	PCHB No .94-148 SHB No. 95-1 FINAL FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

This case involves consolidated appeals by the Nooksack Indian Tribe ("Nooksacks") to the Pollution Control Hearings Board ("PCHB") and the Shorelines Hearings Board ("SHB"). The Nooksacks appealed a Section 401 water quality certification, issued by the Department of Ecology ("Ecology") to Warm Creek Hydro, Inc. ("WCH"), to the PCHB; for a proposed hydroelectric project on Warm Creek, a tributary to the Middle Fork of the Nooksack River. Subsequently, the Nooksacks appealed to the SHB, a shoreline substantial development permit, issued by Whatcom County ("Whatcom"), to WCH, for the same project.

The case commenced in Bellingham, on July 21, 1995. The Board visited the site that day, as an aide to understanding the evidence. The hearing continued in Lacey, beginning on July 25 and ending July 28. The PCHB was comprised of Robert V. Jensen, presiding; Richard C. Kelley and James A. Tupper, Jr. The SHB was comprised of the same three individuals, plus, Bobbi-Krebs-McMullen, Dave Wolfenbarger and Bob Patrick. Mr. Tupper presided over the first day of the hearing. Mr. Jensen presided over the remainder of the proceedings.

The Nooksacks were represented by attorney, Jeffrey Jon Bodé. Ecology was represented by Assistant Attorney General, Mark C. Jobson. WCH was represented by James C. Hanken, of Schwabe, Williamson, Ferguson & Burdell. Whatcom did not participate in the proceedings.

The hearing was recorded by court reporters, Kim Otis and Betty Koharski, affiliated with Gene Barker & Associates, Inc. of Olympia.

Shortly prior to the hearing, WCH raised three partial summary judgment motions, which were briefed by the parties. These were: 1) whether the SHB had any jurisdiction over the shoreline issues because of preemption by the Federal Power Act; 2) whether the shoreline appeal was timely filed; and 3) whether the Nooksacks had waived their right to raise a challenge to Ecology's water quality certification, on the grounds of interference with recreational and aesthetic values. The Board denied the first two motions and granted the latter motion, on the first day of the hearing, advising the parties that its reasoning would be contained in the final order.

Witnesses were sworn and heard, exhibits were entered and reviewed, and the parties submitted post-hearing briefs. Based on the evidence, the Board makes the following:

FINDINGS OF FACT

I

WCH, on September 7, 1993, filed an application with the Federal Energy Regulatory Commission ("FERC"), for the licensing of the Warm Creek Project, a 3,700 kilowatt hydroelectric project on Warm Creek, a tributary of the Middle Fork of the Nooksack River.

II

Warm Creek originates at about 6,800 feet elevation, and drops, in a distance of approximately 4 miles, to elevation 1,550 feet to join the Middle Fork of the Nooksack River. The headwaters of the creek are within the Mt. Baker Wilderness Area. The project lies within the lower Warm Creek drainage basin and Washington Department of Natural Resources lands, which are managed for timber harvesting. The proposed project lies in a Conservancy designation, under the Whatcom Shoreline Master Program ("WSMP"). Whatcom, in the Whatcom County Shoreline Management Program, Background Document 145 (1992) describes Warm Creek "as an excellent trout spawning stream." The project consists of a diversion structure, a small reservoir, an intake structure, a penstock, a powerhouse, a buried transmission line, and appurtenant structures. WCH proposes to divert a portion of the waters of Warm Creek into a 6,000 foot long, 36 inch, steel pipeline, at a 10 foot high diversion dam, across which vehicles can be driven. The diversion would occur at elevation 2,720 feet. The pipeline reduces to 30 inches for the final drop of 1,130 feet to the powerhouse, which is proposed to be located at elevation 1,590 feet. The lower portion of the pipeline is under higher pressure, and is commonly referred to as the penstock. From there, the water returns to Warm Creek into the area described as the tailrace. The stretch of the stream, between the point of diversion and the tailrace, is commonly referred to as the bypass reach. The pipeline through the bypass reach would be buried three feet underground. A new access road is proposed to be built about one-half way up the pipeline road. It will connect to the existing road which goes to the proposed diversion site.

III

A natural waterfall begins approximately 300 feet above the Middle Fork Road bridge. This waterfall is impassable for fish, including salmon. The proposed concrete powerhouse would be located about 500 to 700 feet downstream of the impassable falls, on a bench located midway between the falls and the confluence of Warm Creek and the Middle Fork of the Nooksack River. It would be 42 feet by 32 feet and 18 feet tall.

IV

The potential anadromous fish habitat at issue on Warm Creek is limited to an area between the proposed tailrace from the powerhouse to a cascade in the creek above the Forest Service road bridge. This toe barrier structure functions as a natural barrier to the passage of anadromous fish farther up Warm Creek. Within the river, from this point to the confluence of Warm Creek and the Middle Fork, the available habitat is found in a 193 foot section of the creek adjacent to the proposed location of the powerhouse. The proposed tailrace would discharge to the approximate middle of this 193 foot section. Upstream of this reach no spawning or holding habitat for anadromous species was found. This characterization of the available habitat was the product of numerous consultations with federal and state agencies as well as the Lummi and Nooksack Tribes from December 1990 to July 1993. It was based on a site visit attended by representatives of the Department of Fisheries, the U.S. Fish and Wildlife Service, the National marine Fisheries Service and the Lummi Nation. It was also based on a detailed habitat survey conducted by WCH on May 7, 1993, taken at a time when there was a flow of 40 cubic feet per second ("cfs"), in order to evaluate spawning gravels. The habitat

survey included measuring the width, length, gravel composition, size, and the mean and maximum gravel depth of each patch agreed to during the consultation process as resident coastal cutthroat and potential anadromous fish habitat.

V

The habitat survey done by the Nooksacks and the testimony of Dale Griggs, a fisheries biologist employed by the tribe, do not refute the habitat characterization performed by WCH in consultation with federal and state agencies. In rebuttal testimony, Blum established from the field notes prepared by tribal biologists that the area of habitat they identified was essentially the same section identified by the applicant during the consultation process. In rebuttal to the Blum testimony, Griggs did not take issue with this analysis of the areal extent of habitat, but only the number of redds (nests) the potential habitat the habitat could support. the weight of evidence establishes that WCH has properly identified the extent of potential habitat.

VI

In the course of agency consultations, a question was raised as to whether the powerhouse could be located above the identified potential habitat. Locating the powerhouse upstream was rejected for consideration. The reason given was that an upstream location would require the penstock to traverse a side flood channel creating a threat of pipe failure and mass wasting.

VII

The concerns of an alternate location of the powerhouse and tailrace were not, however, fully addressed in the agency consultation documents or the testimony presented at the hearing.

A structural engineer called as a witness by WCH testified that it would be possible to locate the powerhouse upstream, but that he had not assessed the feasibility of doing so and was not aware of the potential of the potential spawning area identified in the habitat survey. We are unable to determine whether an upstream location would be environmentally sound. An upstream location would nonetheless be preferred to the extent it would eliminate any adverse impact on potential anadromous fish habitat.

VIII

The proposed project lies about two miles below the Mt. Baker Wilderness Area. Relatively recent clear-cut logging has occurred in the upper one-half of the project area. The lower portion contains old-growth timber, and in the area of the proposed powerhouse, closed-conifer pole - saw timber.

IX

The bypass pipeline will be sized to contain a maximum flow of 50 cfs. For most of its route, it would be more than 200 feet away from Warm Creek. It would contain a leak detection system which would automatically utilize a shut-off valve at the intake structure to stop the flow. The burial of the pipeline provides extra protection from earthquakes. We believe it is unlikely that a pipe rupture would occur that would cause damage to the anadromous fish zone.

X

The City of Bellingham, in 1959, built a diversion dam on the Middle Fork River, for the purpose of obtaining a water supply, approximately 5.7 miles downstream from the project. Sometime prior to the dam's construction, the Nooksack River was roughly surveyed for

steelhead by Don Ernst, a Department of Game employee. Ernst described the Middle Fork of the Nooksack River as follows:

> Extremely discolored by glacial debris except in periods of cold weather - drains west slope of Mt. Baker. Stream too muddy to determine the extent of spawning in the main stem, but suitable areas are plentiful. Bad falls .8 miles from forks fish do get over. No other obstructions but terminal point of migrations is believed to be near Warm Creek. Upper areas very inaccessible and not overly well known.
>
> Tributaries extremely precipitous and generally small. Some spawning is done in the river valley flat of the mouths of these streams. Practically no spawning or rearing area in any individual tributary.
>
> Far less steelhead here than in either the North or South Fork. Area and tributaries are more limited.

Clearwater Creek, which is the next major tributary to the Middle Fork of the Nooksack River, below Warm Creek, was described by Ernst as "[a] beautiful large tributary with many good spawning areas. No obstructions."

XI

The Department of Wildlife, which was the successor to the Department of Game, currently acknowledges that, although the issue is debated among biologists, the waters of the Middle Fork of the Nooksack River, upstream of the diversion dam; historically were populated by spring chinook and coho salmon and steelhead.

XII

The Bellingham diversion project was built without fish ladders. It effectively blocks upstream migration of salmon and steelhead fish. There exists however, the potential for this dam to be laddered at some time in the future. The major present obstacle to such laddering is

the potential for pathogenic infection of native and hatchery bred kokanee trout in Lake Whatcom. However, the Governor and the fisheries agencies have left the door open to the laddering proposal, recognizing the importance of restoring the state's wild salmon runs. Indeed, that is precisely why Ecology conditioned the water quality certification, namely to avoid permanently closing the door on the reintroduction of anadromous fish runs above the Bellingham diversion dam. If the dam were eventually laddered, the area of Warm Creek, below the impassable falls would become accessible to migrating salmon and steelhead. Steelhead and spring chinook salmon are the most likely anadromous fish to inhabit the area above the powerhouse, should the diversion dam be laddered. Winter steelhead would reach the proposed project area between January and June of each year.

XIII

On June 25, 1993, WCH applied for a section 401 water quality certification from Ecology. On May 9 and 16, 1994, Ecology published in the Bellingham Herald, notice of the pending application. The notice advised that if the comments received indicated significant public interest, Ecology could determine to hold a public hearing on the matter. Ecology received no response from the Nooksacks. It did receive a response from the Department of Fish and Wildlife ("DOF&W"), dated May 12, 1994, which recommended that the any certification "take into consideration the potential for anadromous fish presence in the project area."

XIV

Ecology granted the certificate on June 23, 1994. The certificate states that it "does not exempt and is provisional upon compliance with the state's Coastal Zone Consistency Determination." Ecology's certification established minimum stream flows, in the bypass

stretch, to protect the resident trout, as a condition of its approval of the project. Ecology relied upon the instream flow incremental methodology ("IFIM") to set these flows. They are:

October 16 - July 15	4 cubic feet per second ("cfs")
July 16 - October 15	14 cfs.

XV

The water quality certification protects against potential adverse impacts to anadromous fish habitat by reserving the right to modify the instream flow requirements:

> In order to assure continuing compliance with Chapter 173-201A WAC, the Department of Ecology retains the right to amend the instream flow requirements specified in this certification in the event that federally listed or anadromous fish are found to inhabit or gain access to the project reach.

A similar condition was incorporated into the shoreline permit, as approved by Ecology.

XVI

The conditions were arrived after an extensive consultative process. The requirements were based on an Instream Flow Incremental Methodology ("IFIM") study, in which state and federal agencies participated. The specific language was also endorsed by the DOF & W and Ecology.

XVII

WCH, on September 22, 1993, applied to Whatcom for shoreline substantial development and conditional use permits. The Whatcom staff recommended approval of the permits, with conditions. On February 3, 1994, a hearing on zoning and shoreline permits was held before Whatcom Hearing Examiner, Edward L. Good. In his written findings of fact, conclusions of

law and decision, of February 25, he ruled that the permits should be denied. This decision was appealed to the Whatcom Commissioners, who reviewed the record from the Hearing Examiner and, in their findings of fact, conclusions of law and decision, reversed the Hearing Examiner's decision, on October 4, 1994. Ecology, on December 2, approved the shoreline conditional use permit, adding conditions. The first condition included in the shoreline permit, Ecology's condition regarding the right to amend instream flow requirements; based either on monitoring, or in the event that federally listed or anadromous fish were found to gain access to or inhabit the project reach. Ecology expanded on its original water quality certification condition, to include not only federally listed, but also state listed fish. The second condition requires one or two additional water quality sampling tests. The third condition requires the applicant to take "all practical steps as determined by Ecology to avoid disturbance to tribal cultural materials identified or discovered during the project's review, construction and operation." Ecology, in addition, "to mitigate visual impacts to the project area," required the applicant to "revegetate disturbed areas with native species and provide structural screening with native vegetation and other Ecology-approved materials."

XVIII

On December 14, 1994, FERC determined that licensing of the Warm Creek and Clearwater Creek Hydroelectric Projects, could constitute a major federal action significantly affecting the quality of the human environment. Therefore, it announced its intent to prepare an Environmental Impact Statement ("EIS") for the projects.

XIX

Currently, there are six licensed hydroelectric projects in the Nooksack River Basin, two of these licensed projects have not been built; there is one project which has been built but is not licensed; and there are nine proposed projects in the basin; for a total of 16. FERC in 1991 did an environmental assessment of the cumulative impact of seven of the proposed projects. FERC intends to study the cumulative impacts of the Clearwater and Warm Creek projects, in the EIS it is preparing for those projects.

XX

The Nooksacks are a Coast Salish tribe located in northwestern Washington. In the early 19th century, the Nooksacks lived in approximately 13 winter villages on or near the Nooksack River, its tributaries, the Sumas River and Lake Whatcom. They regularly hunted, fished and gathered foods and material in the Nooksack River Basin. Warm Creek and the Middle Fork of the Nooksack River were an important route of access for the Nooksacks to the slopes of Mt. Baker, with which they had a strong traditional relationship. Following the Treaty of Point Elliott of 1855, the Nooksacks were expected to move onto the Lummi Reservation. However, they chose to remain near their traditional village locations. In 1973, the Nooksacks obtained federal recognition with a small reservation.

XXI

The Nooksacks currently have 1,300 enrolled members. The current tribal leaders maintain that the waters of Warm Creek were traditionally utilized by the Nooksacks for ritual bathing, due to their high elevation, just below the snow level, and the existence of clean, pure, pools of water. Unfortunately, they have not yet documented any actual, as opposed to potential, use of these waters. It is their intent to do so through the use of a tribal survey, which would

contain adequate confidentiality to protect the strong sense of privacy of tribal members, in matters of religion.

XXII

Any conclusion of law deemed to be a finding of fact is adopted as such. Based on these findings, the Board makes the following:

CONCLUSIONS OF LAW

I

The Boards have jurisdiction over the issues and subject matter of theses appeals. RCW 43.21B; RCW 90.48; RCW 90.58. WCH's contention that the Nooksacks did not timely file their appeal is premised on a belief that where substantial development and conditional permits are jointly issued for a project, appellants must file within the statutory appeal period following the substantial development; where the conditional use permit under the Shoreline Management Act ("SMA") is approved later. We reject that contention, and hold that the Nooksack's timely appeal of the conditional use permit, satisfied as well the appeal timelines for the substantial development permit. WAC 173-14-090, fourth paragraph. To read the law otherwise would place an unintended and untenable burden on the right of aggrieved parties to appeal shoreline permit decisions. See Bidwell v. Bellevue, Order on Motion for Summary Judgment, SHB 93-78 (1994) (concluding that an appellant could, by appealing either of two consecutive shoreline permits for the same project, challenge both permits by a single appeal of either decision).

II

At the commencement of the hearing, the PCHB ruled that the Nooksacks, by stipulating, during depositions, that they did not plan to raise the issues of interference with its recreational and aesthetic rights, had waived the right to raise a legal issue as to whether the instream flows set by Ecology, in its water quality certification, were sufficient to protect the tribe's recreational and aesthetic values. During the hearing, evidence came in, without objection as to the potential interference with these values from the project. This evidence came in conjunction with the Nooksack's contention that their cultural use of the stream would be substantially impaired by the project. The cultural issues had been reserved under the Shoreline Management Act ("SMA") issues. At the conclusion of the Nooksack's case, WCH moved to dismiss all the issues challenging Ecology's water quality certification.

III

Prior to the final hearing herein the applicant moved to dismiss the appeal before the SHB on the grounds that the Shoreline Management Act was preempted by the Federal Power Act and authority of FERC. In the alternative, appellant argues that even if the SMA is not preempted, the proposed project is outside the any coastal zone and therefore not subject to shoreline permitting requirements. The SMA is implicated in the appellant's FERC application by virtue of the Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451 - 1464, under which any applicant for a federal license must obtain a certification from any affected state that the proposed activity complies with the enforceable policies of the state's approved coastal zone management program. 33 U.S.C. § 1456(c)(3)(A). The core of our state coastal zone

management program is the SMA, including its permit provisions. Friends of the Earth v. U.S. Navy, 841 F.2d 927, 935 (9th Cir. 1988).

IV

There is no basis for concluding that the SMA is subject to preemption. There is no express preemption in the Federal Power Act. Indeed, the terms of the CZMA cited above establish just the opposite. Nor is there any conflict between the SMA and the Federal Power Act. FERC has not issued a license for this project and presumably will not do so until the applicant has completed the shoreline permit process. We are not therefore presented with a situation where it is impossible to comply with both federal and state law or where compliance with state law stands as an obstacle to the purposes and objectives of the Federal Power Act. Inland Boatmen v. Department of Transportation, 119 Wn.2d 697, 702 (1992). As the applicant represented in its own application, a shoreline permit application is necessary to obtain the certification required by the CZMA. We are equally persuaded that the SMA is not preempted on the basis that Warm Creek is outside the coastal management zone. As approved by the federal government, the state plan includes any watershed west of the crest of the Cascade Mountains that might affect land, water use or natural resources within the coastal zone. 15 C.F.R. § 923.31(b)(1).

V

In an oral ruling, the PCHB granted WCH's motion (pertaining to dismissal of all remaining water quality certification issues) subject to the condition that the certificate be modified so that Ecology's right to amend the instream flows, in the event of the entry of

anadromous fish to the project area, be clearly expressed as a nonseverable condition of the certificate In other words, if that condition were removed, the certificate would become null and void. We affirm that ruling here, concluding that such condition is essential to meeting both the antidegredation provision of Ecology's water quality regulations and the provisions of the SMA and the WSMP. We conclude that historically, the Middle Fork of the Nooksack River above the Bellingham diversion dam and its tributaries, including portions of Warm Creek, within the project area, supported native runs of anadromous fish. But for that dam, they would be supporting those runs today. It is therefore, essential, to conform to the strong policies of the water quality and shoreline laws,[1] that the door be kept open to restoring these natural fish runs. Without this protection, the door would be shut that much tighter against the likelihood of any restoration.

VI

The PCHB, in the process of granting WCH's motion, ruled that it did not believe that the potential for ritual bathing rose to the level of a beneficial use, intended to be protected by Ecology in its antidegradation regulation (WAC 173-201A-070). At the close of the hearing, the Nooksacks asked the PCHB to reconsider its ruling, contending that ritual bathing qualifies as a recreational, beneficial use.

VII

[1]The initial sentence of the SMA declares: "The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation."(Emphasis added).

The PCHB affirms its earlier ruling. Even though we agree that ritual bathing could potentially qualify as a recreational, and therefore a beneficial use, under WAC 173-201A-030(1)(v) and WAC 173-201A-070(1), the Nooksacks did not satisfy their burden of proving that the waters of Warm Creek have been so used.

VIII

At the close of the Nooksack's case, WCH also moved to eliminate issue number four from the Pre-Hearing Order. That issue was whether Ecology acted contrary to RCW 90.54.010 and WAC 173-201A-070(4), in not consulting with or notifying the Nooksacks, or convening a public hearing or other public process regarding the establishment of instream flows in its certificate. The PCHB granted that motion. The Nooksacks have not asked the PCHB to reconsider that ruling. We conclude that Ecology gave adequate public notice of the pending water quality certification.

IX

Shoreline substantial development permit applications are issued or denied by local government, based on their consistency with the policies of the SMA and the local shoreline master program. RCW 90.58.140(2)(b). Shoreline conditional use and variance permit applications are additionally reviewed for consistency with special conditional use regulations, which must be consistent with Ecology's regulations. RCW 90.58.100(5); WAC 173-14-155; Buechel v. Department of Ecology, 125 Wn.2d 196, 206-07, ___ P.2d ___ (1994) (holding that Mason County correctly applied its own variance criterion to a shoreline project, because it was more restrictive than Ecology's minimum standards). Moreover, Ecology must review and

approve or deny any shoreline conditional uses or variances approved by local government.

RCW 90.58.140(12).

X

Whatcom's conditional use criteria are set forth in its master program, at section 23.60.192, as follows:

> Uses specifically classified or set forth in this Program as conditional uses may be authorized provided the applicant can demonstrate all of the following:
>
> (a) That the proposed use will be consistent with the policies of RCW 90.58.020 and this Program.
>
> (b) That the proposed use will not interfere with normal public of public shorelines.
>
> (c) That the proposed use of the site and design of the project will be compatible with other permitted uses within the area.
>
> (d) That the proposed use will cause no unreasonable adverse effects to the shoreline environment in which it is to be located.
>
> (e) That the public interest suffers no substantial detrimental effect.

In addition, the WSMP mandates that:

> In the granting of all conditional use permits, consideration shall be given to the cumulative environmental impact of additional requests for like actions in the area. For example, if conditional use permits were granted for other developments the area where similar circumstances exist, the sum of the conditional uses and their impacts should also remain consistent with the policies of RCW 90.58.020 and should not produce a significant adverse effect to the shoreline environment.

Section 23.60.194.

XI

We are asked to determine whether the project constitutes either a "stream control work," or a "hydropower facility," under the WSMP. Stream control works are defined in the WSMP as:

> all development on rivers and streams designed to retard bank erosion, to reduce flooding of adjacent lands, to control or divert stream flow, or to create a reservoir, including but not limited to revetments, dikes, levees, channelization, dams, vegetative stabilization, weirs, flood and tidal gates. Excluded are water pump apparatus. (Emphasis added.).

The project does include a dam, upstream of the anadromous reach. Section 23.100.170.32(c)(4), provides that stream control works shall be permitted only for certain purposes:, among them being: "[u]tilization of water resources for power generation, flood control or water supply." this latter provision appears to allow the proposed project. However, section 23.100.170.32(e) states that: "[s]tream control works are prohibited on estuarine shores, wetlands, point and channel bars, and salmon and trout spawning areas, except for the purpose of fish or wildlife habitat enhancement." (Emphasis added.). The project reach is a trout spawning area. Thus, reading these various sections together, it appears that even hydroelectric facilities are barred. However, these sections cannot be read in isolation, but must be read together with the WSMP provisions dealing more specifically with hydropower development.

XII

Section 23.100.110.22 is the policy for hydropower development. It provides as follows:

> [h]ydropower facilities should be located, designed and operated to: provide maximum protection and enhancement of fish and wildlife resources, including spawning, nesting and rearing habitat and migratory routes; protect valuable or sensitive natural features such as natural wetlands, sensitive geohydraulic processes, waterfalls, erosion and accretion shoreforms, agricultural land, scenic vistas, and recreation sites; accommodate

> public access to and multiple uses of the shoreline; and protect sites having significant historical, cultural, scientific or educational value. (Emphasis added.).

This section encourages such facilities, provided that they be very strictly scrutinized and regulated in order to protect and enhance migrating fish and other valuable shoreline amenities, to the maximum extent possible.

XIII

Section 23.100.110.31(d), under the regulations governing port and industrial uses, provides that in the Conservancy designation:"[i]ndustrial and port development is prohibited, except hydropower and accessory development which may be authorized as a conditional use." (Emphasis added.). This is a clear statement that hydropower facilities may be authorized, provided they meet the more restrictive criteria for conditional uses. Both Whatcom and Ecology interpreted the master program such that the hydropower provisions govern over the stream control works provisions, in regard to this project. We agree with this interpretation, on the ground that where there is a conflict between two provisions of a law, the more specific shall control Hama Hama v. Shorelines Hearings Bd., 85 Wn.2d 441, 447-48, 536 P.2d 157 (1975).

XIV

The SHB, absent an appropriate provision in the WSMP, has no jurisdiction over the economic feasibility of the project or its location. See Whatcom County Water District #10 v. Whatcom County, Modified Final Findings of Fact, Conclusions of Law and Order at 13, SHB 92-41 (1993) (holding that where the master program does not expressly prescribe a review of economic feasibility, in analyzing alternative locations, none is required); Defense Fund v.

Metro Seattle, 59 Wn. App. 613, 800 P.2d 387 (1990). Because there are no provisions in the SMA, nor the WSMP applicable to this project which require an economic feasibility analysis; we conclude that FERC has the exclusive jurisdiction, in this case, over a determination as to the feasibility of the project, including the economic feasibility of the location of any of its components.

XV

The SHB, under the SMA and the local master program, clearly does have the authority to determine the environmental feasibility of shoreline development. In this case, we are not persuaded that the applicant, Whatcom, or Ecology adequately explored the environmental feasibility of locating the powerhouse and tailrace to a site with less adverse impact on fish habitat. The applicant postulates that location of the tailrace and powerhouse is irrelevant because fish habitat will be protected by an operation of the facility which must meet instream flows, which are designed to protect that habitat. This position begs the primary question which the SHB is forced to consider under the SMA; namely, whether the location of the proposed powerhouse and tailrace facilities will provide the optimum protection for fish habitat.

XVI

To approve the conditional use permit, the SHB must conclude, as a matter of law, that the proposed use will be consistent with the policies of the SMA and of the WSMP. Although WCH apparently has considered alternative locations for the powerhouse and tailrace, we cannot conclude from the evidence that alternative locations were considered in light of the strong policies of the SMA and the WSMP to provide the maximum protection to fish habitat. Section

23.100.110.22 thus directs that hydropower facilities "should be located, designed and operated to provide maximum protection and enhancement of fish . . . resources including spawning, nesting and rearing habitat and migratory routes (Emphasis added.). This language manifests an intent in the master program to broadly define what constitutes unreasonable adverse shoreline environmental effects in the Conservancy designation.

XVII

The final paragraph of RCW 90.58.020, contains a finding by the Legislature "that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, restoration, and preservation."(Emphasis added.). The same statutory section mandates that "uses in the shorelines of the sate, shall be designed and conducted in a manner, to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area . . ." (Emphasis added.). On the one hand, the master program directs that uses on the shoreline maximize the protection of fish habitat; on the other the SMA mandates that any permitted shoreline use minimize damage to the shorelines. This mandate, with even more force, applies to a conditional shoreline use, such as WCH's hydropower proposal. These policies are reflective of the rigorous policy of the SMA to protect the shorelines of the state, as fully as possible. Buechel, at 203.

XVIII

The tailrace and powerhouse are currently proposed to be located approximately in the middle of the limited, suitable fish habitat of Warm Creek. It is obvious that Whatcom (and

Ecology) in approving the WSMP, consider the fish habitat of its Conservancy shorelines, including Warm Creek, to be important. To the extent that the powerhouse and tailrace can be relocated upstream, there would be a reduced adverse impact on the existing and potential fish habitat of this shoreline.

XIX

We therefore conclude that the shoreline conditional use permit and substantial development permits must be remanded to provide an opportunity for WCH, Whatcom, and Ecology to consider siting the powerhouse upstream, above residential and potential anadromous fish habitat, in an environmentally sound manner. If this were done, the project would comply with the requirement that it be consistent with the policies of RCW 90.58.020 and the WSMP (WSMP, Section 23.60.192(a)). Moreover in this manner, there would be an assurance lacking in this record, that the location of the powerhouse and tailrace would not cause any unreasonable adverse effects to the Conservancy designation, under section 23.60.192(d).

XX

Such reconsideration would ensure that the location of the powerhouse and tailrace are consistent with the strong public policy in restoration and enhancement of natural fish runs, and therefore, in conformance with section 23.60.192(e). We further believe, as explained below, that placement of the powerhouse and tailrace in the middle of a potential anadromous fish habitat; without further weighing of that decision against the strong policy of fish habitat protection in the WSMP, could stultify further efforts to restore natural fish runs above the Bellingham diversion dam.

XXI

That brings us to the final point, that approval of this project cannot be done in isolation. From the record we know that there are numerous proposals in the wings for hydroelectric facilities in the Nooksack River Basin, including the Clearwater Creek Project, which is also proposed for location upstream of the Bellingham diversion dam, on a tributary to the Middle Fork of the Nooksack River. Approval of the Warm Creek Project, with the powerhouse and tailrace located in the middle of the resident and potential anadromous fish reach, could set a precedent for approval of the Clearwater Project (and any similar future projects above the Bellingham diversion dam) and their potential locations in regard to any resident fish and any future anadromous fish runs. We believe that it is premature to consider the potential cumulative impacts, however, until WCH, Whatcom and Ecology have fully considered and compared the potential cumulative impacts from the presently proposed location of the tailrace and powerhouse, with a location upstream of the present and potential resident and anadromous fish habitat on Warm Creek. This requirement to consider the cumulative impacts is consistent with the criteria of section 23.60.194, pertaining to the approval of shoreline conditional uses, and with the strong policies of the SMA against such impacts. Hayes v. Yount, 87 Wn.2d 280, 287, 522 P.2d 1038(1976) (holding that "numerous projects, each having no significant effect individually, may well have very significant effects when taken together.")

XXII

Finally, we affirm and clarify Ecology's decision to grant the water quality certification. As we stated in granting WCH's motion to dismiss the water quality certification issues, at the

conclusion of the Nooksack's case, we believe that such a condition should be clearly stated as a nonseverable condition. Additionally, it should be made consistent with Ecology's condition placed on the shoreline conditional use permit, by including state listed fish in the fish to be protected by instream flows.

XXIII

Ecology wrote in its certification, that the certification was provisional upon the project's consistency with the state's Coastal Zone Consistency Determination. As we have concluded here, the proposed location of the powerhouse and tailrace, without further justification, is inconsistent with the SMA and the WSMP. We believe that this determination must be directly incorporated into the water quality certification, in order to fulfill the policy of the SMA against piecemeal and uncoordinated decisions pertaining to the uses in the shorelines of the state. RCW 90.58.020. We likewise make this a nonseverable condition of the water quality certification.

XXIV

Any finding of fact which is deemed a conclusion of law is hereby adopted as such. From these conclusions of law, the Boards enter the following:

ORDER

1. Ecology's approval of the section 401 water quality certificate for the Warm Creek Project, is affirmed by the PCHB, subject to the following additional conditions:

a. The second paragraph of General Requirement II.B. of the conditions is modified to read as follows:

> In order to assure continuing compliance with Chapter 173-201A WAC, the Department of Ecology retains the right to amend the instream flow requirements specified in this certification in the event that federally, or state listed or anadromous fish are found to inhabit or gain access to the project reach. This is a nonseverable requirement of Ecology's certification. If it is rejected, in whole or part by FERC, Ecology's water quality certification for the Warm Creek Project shall be null and void.

b. Paragraph two of Ecology's Order No. DE 94WQ-N315 (Water Quality Certification) is amended to read:

> This certification does not exempt and is provisional upon compliance with the State's Coastal Zone Consistency Determination. That determination shall conform to the final decision rendered in the proceedings for the shoreline permits pertaining to this project, after all appeals have been exhausted. This is a nonseverable requirement of Ecology's certification If this condition is rejected, in whole or part by FERC, Ecology's water quality certification for the Warm Creek Project shall be null and void.

2. The issuance by Whatcom of the shoreline substantial development and conditional use permits to WCH for the Warm Creek Project; and the approval of the shoreline conditional use permit by Ecology, are remanded by the SHB to Whatcom to determine, with appropriate public notice and opportunity for interested parties to comment: whether locating the powerhouse and tailrace above resident and potential anadromous fish habitat in Warm Creek is environmentally feasible; and make new shoreline permit decisions consistent with its determination on that issue.

DONE this 27th day of November, 1995.

SHORELINES HEARINGS BOARD

ROBERT V. JENSEN, Presiding

RICHARD C. KELLEY, Member

(See Minority Opinion)
JAMES A. TUPPER, JR., Member

BOBBI KREBS-MCMULLEN, Member

(See Minority Opinion)
DAVE WOLFENBARGER, Member

BOB PATRICK, Member

POLLUTION CONTROL HEARINGS BOARD

ROBERT V. JENSEN, Presiding

RICHARD C. KELLEY, Member

(See Minority Opinion)
JAMES A. TUPPER, JR., Member